BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLI PERKINS	)	
Claimant	)	
	)	
VS.	)	
	)	
PRESTIGE CABINETS	)	
Respondent	)	Docket No. 1,040,430
	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the August 1, 2011 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on October 21, 2011. E.L. Lee Kinch, of Wichita, Kansas, was appointed as Board Member Pro Tem in this matter in place of former Board Member Julie A.N. Sample. Recently appointed Board Member Gary Terrill was not appointed until after this matter had been argued to the Board. The appointment of Mr. Kinch was, therefore, allowed to stand.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Ali N. Marchant, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found the claimant to be permanently and totally disabled because "claimant's post-carpal tunnel job prospects are so limited that the presumption of permanent total disability" under K.S.A. 44-510c(a)(2) has not been rebutted. (Award pg. 6)

Respondent appeals regarding the nature and extent of claimant's injuries, arguing that the claimant is not permanently and totally disabled and therefore that portion of the ALJ's Award should be reversed and claimant should be limited to no more than the percentage of functional impairment to her upper extremities.

Claimant argues that the ALJ's Award should be affirmed.

FINDINGS OF FACT

Claimant began working for respondent on September 4, 2007 on the chop line. At one point, claimant was laid off and then rehired. When claimant returned, she first worked as a buffer and then on the paint line. Claimant claims she sustained injuries each and every working day ending the date she last worked, April 1, 2008. Prestige Cabinets manufactures cabinets for bathrooms and kitchens. Before working for respondent, claimant worked at Medicalodge North from March 2006 to August 2007 as a housekeeper. And before that she worked at Snak Atak as a sales clerk from November 26, 2001 to November 23, 2005.[1]

Claimant had an automobile accident in 2005 and suffered a head injury that left her in a coma for three days and affected the way she speaks. Claimant doesn't have a driver's license because it was suspended after her car accident. Now, claimant must have a physical examination every year to keep her license. She testified at the regular hearing that she was in the process of trying to get her licence reinstated as she had not had one for the year for financial reasons.[2]

Claimant's work had her working above her 5 foot 1 1/2 inch body and using a sanding tool for buffering. In January 2008, while buffering an overhead door frame, claimant had to pull down some framing and felt a sharp pain go from her neck down her arms. Claimant testified that the doors are hanging on a assembly line that is constantly moving and she had to keep up and move as fast as she could. Claimant testified that she

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[1] R.H. Trans. at 30-31.

[2] R.H. Trans. at 21-22.

had to flex her wrists to wipe down the doors and that about 4,000 doors go down the line each day.[3]

Claimant reported this accident to her supervisor saying that she "hurt right here into my arms" and needed to see a doctor. Claimant was sent to Human Resources (HR). Claimant testified that she was clear with Melanie in HR that she was injured at work and reported how the injury occurred.

Claimant was sent to see the company physician, Dr. William Harrison. Dr. Harrison took x-rays and opined he thought claimant had carpal tunnel syndrome. Claimant was left in the care of Dr. Darcy Selenke. Dr. Selenke gave claimant a Vitamin B-12 shot and put her on restricted duty. Despite restricted duty, claimant's condition in her arms and neck continued to get worse.[4]

Claimant testified that while she worked her hands started to go to sleep. She was moved out of the buffering department and into the office filing paperwork, which had her using her hands much more and caused her more pain. Claimant was then moved to the department that breaks down frames to be reprocessed, which she reported was like "driving your car in a brick wall where you're slamming like this". This made her hands and neck really hurt. Claimant explained the process of preparing frames to be reprocessed as taking the frames and slamming them into the cement to break the seal. Claimant did this all day for 8 hours. Claimant reported this increased pain to her supervisor.[5]

On February 12, 2008, claimant was working on the paint line. When she reached up to pull a door down, she felt a pain go across and down her shoulders and into her hands. Claimant continued to work after the February 12, 2008 incident and the pain in her hands continued to get worse to the point where she couldn't use her hands. Claimant blamed repetitive motion for the continued pain.

Claimant was sent to Dr. Darcy Selenke and was given a vitamin B-12 shot. Claimant's supervisor, Gary Mathis, put her on light duty and then took her to Human Resources at which time her employment was terminated because respondent didn't feel she could do the job anymore. Claimant last worked on August 1, 2008. After claimant was terminated and before she had surgery she worked for Genesis Janitorial Services at Home Depot in July 2008. Although she was not physically able to do the repetitive work for very long, it didn't cause any permanent worsening of her condition.[6]

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[3] *Id.* at 8-9.

[4] P.H. Trans. at 9-10.

[5] *Id.* at 10-11.

[6] *Id.* at 15-16.

Claimant's care was transferred to Dr. Brian Ellefsen, who sent her for an EMG, which showed severe bilateral carpal tunnel syndrome. Claimant had a right carpal tunnel release on October 24, 2008 and a left carpal tunnel release on January 9, 2009. Thereafter, claimant had occupational therapy with partial improvement.

Dr. Ellefsen released claimant to return to work on February 26, 2009, and told her to return PRN. He also assigned permanent light duty restrictions of no repetitive grasping or pinching and no use of vibratory or torque tools.

Claimant is not working, but continues to look for work everyday. She is also receiving vocational rehabilitation through SRS as recommended by Dr. Ellefsen. As part of the voc rehab plan, claimant was sent to see Robert Whitten, Ph.D., a psychologist, who tested claimant on June 19, 2009. Dr. Whitten found claimant's IQ to be 78 and reported that despite the years of college attendance, claimant's full scale IQ was within the upper extremity of borderline mental retardation. Claimant was not aware of this.

Claimant's complaints at the Regular Hearing were of pain in the hands, arms and shoulders, with difficulty gripping and hanging onto things. Claimant testified that before working for respondent, she never had any problems with her arms. Claimant had used her hands and arms 8 hours a day for her job and continued to do so until it bothered her too much to continue.

Claimant, at the request of her attorney, met with Dr. John D. Pro, a board certified physician and psychiatrist for an IME, on December 18, 2009, with chief complaints of pain in the right elbow which shoots up her arm into the shoulder. This pain came on after the last hand surgery. Both hands continued to be weak, but the neck pain was almost resolved. Dr. Pro reviewed claimant's medical records and noted that claimant sustained a head injury on June 28, 2005 from a motor vehicle accident. Dr. Pro also took a psychosocial history from the claimant.[7]

Dr. Pro noted that claimant met with Dr. Whitten in 2005 after her auto accident, and that Dr. Whitten's findings are consistent with how the claimant presented to him in 2009.

> . . . Dr. Whitten's evaluation, he noted bruising and bleeding at the base of her brain, bruising on top of her brain and then a subdural hematoma, which is an area of bleeding on top of the brain also, but it's several layers underneath the actual -- on top of the actual brain tissue.
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> . . . He also determined her full scale IQ was 78, which is low average. This is a person who received good grades in college. He also noted poor processing speed and he thought that those problems were related to the head trauma rather than the actual mental retardation. He also thought that the working memory and

[7] Pro Depo. at 8-9.

> concentration were seriously impaired. He gave her a GAF score of 45 indicating a serious impairment in cognitive, emotional and occupational functioning.[8]

Dr. Pro explained that the mental status examination focuses on the mental aspects of the patient and an objectification of his observation of what the patient tells him. Claimant presented with slurred speech (dysarthria), and issues with recent memory. She was not suicidal. She had some difficulty with cognition.[9] Claimant's MMSE (Mini Medical Status Examination) score was 28.[10]

Dr. Pro determined that the bleeding on claimant's brain caused her confusion, dementia, recent memory loss, speech problems and irritability.[11] Dr. Pro noted that before claimant's injury at work with respondent and after her car accident in 2005, she was able to work.

Dr. Pro opined that the claimant has a static form (this is a common form of dementia in persons with a number of head injuries) of dementia from a head injury, not progressive dementia. He opined that in 5 years she won't be like an Alzheimer's patient, but she will be a lot worse than she is now. Dr. Pro noted that the loss of intellectual functioning can result in social and occupational impairment.[12]

Dr. Pro opined that the dementia claimant developed after the auto accident in 2005, left her with a 45 percent permanent partial impairment. He found no evidence of malingering, significant secondary gain or deliberate falsification of claimant's symptoms or dramatization of her systems.

Dr. Pro believes that since her work injury on February 12, 2008, claimant has been unable to work. It is Dr. Pro's opinion that, within a reasonable degree of medical certainty, claimant is permanently and totally disabled from performing substantial, gainful employment as a result of her work injuries at Prestige Cabinets.

Dr. Pro didn't test the claimant to see if she was depressed because he didn't feel that she was, and he didn't feel like her pain was a part of her psychological profile. Dr. Pro believes claimant has an impairment to her short term memory and some impaired judgement as a result of the head trauma.

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[8] *Id.* at 14.

[9] *Id.* at 11-12.

[10] *Id.* at 25.

[11] *Id.* at 15-16.

[12] *Id.* at 33-34.

Dr. Pro initially deferred to the opinion of Dr. Prostic as to whether claimant could go back to work as a housekeeper for Medicalodge based on her carpal tunnel problems, absent the head injury.[13] He later testified that claimant, in his opinion, can't work anywhere based on the combination of her orthopaedic and psychological impairment.[14]

Claimant met with Dr. Edward Prostic on July 16, 2008 regarding her work injury. Claimant reported complaints of pain at the base of her neck, which radiated to her right and left arms with numbness in the right index, long and ring fingers and sometimes the whole left hand. These symptoms were worsened by reaching or lifting. Dr. Prostic opined that claimant sustained repetitious minor traumas to the cervical spine. Claimant's history suggests that she had right C7 radiculopathy and her examination suggested mild thoracic outlet syndrome on the left. Dr. Prostic recommended an MRI of the cervical spine to determine a course of treatment. X-rays of the cervical spine showed discopathy at C6-C7 with right C7 radiculopathy. After confirming claimant had C7 radiculopathy, Dr. Prostic recommended epidural injections because he didn't feel claimant's herniated disk was severe enough to warrant consideration for surgery.[15]

Dr. Prostic testified that the results of his examination were consistent with the complaints the claimant reported as being the result of her work injuries with respondent.[16]

Dr. Prostic didn't initially assign restrictions because it was his understanding or misunderstanding that under *Casco*[17] if the impairment is related to bilateral upper extremity impairments work restrictions "don't count".[18] By letter dated August 26, 2008, Dr. Prostic assigned restrictions for the claimant to avoid lifting weights greater than 30 pounds occasionally or 15 pounds frequently, avoid over-the-shoulder activities and avoid more than minimal use of vibrating equipment.[19]

Dr. Prostic met with the claimant again on March 16, 2009, for reevaluation and to discuss the results of the MRI, which revealed minimal degenerative changes. At this visit, claimant continued to complain of soreness in her palms with decreased grip and pinch. She also reported occasional numbness in her palms and pointed to her hypothenar areas

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[13] *Id.* at 44-45.

[14] *Id.* at 49.

[15] Prostic Depo. (Mar. 26, 2010) at 20-21.

[16] *Id.* at 7.

[17] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh. denied (May 8, 2007).

[18] Prostic Depo. (Mar. 26, 2010) at 23.

[19] *Id.*, Ex. 2.

with complaints consistent with the mechanism of injury given by the claimant while working for respondent.

Dr. Prostic found claimant to be at maximum medical improvement, opining that she was at a stable plateau in her healing. He had no individual opinion of claimant's limited cognitive abilities or diminished mental capabilities and relied on the reports from Dr. Pro and Karen Terrill he had received. Dr. Prostic opined that the claimant doesn't have good grip durability in her hands and therefore she can't go back to duties that are predominately manual.[20] Dr. Prostic went on to assign a 15 percent permanent partial impairment to each upper extremity based on the 4th Edition of the AMA *Guides*.[21]

Dr. Prostic believes that the claimant is realistically permanently and totally disabled from gainful employment. And that this inability to return to work is a result of the work injuries at respondent.[22]

Stacey Stuart, Human Resource Manager for RSI Home Products (this is a company that manufactures cabinets), testified that RSI employs approximately 165 people and about 140 of those people are hourly employees who work on the floor. She went on to testify that at the Columbus location there are several different areas of production.

Ms. Stuart's job is to maintain compliance in all areas of the company's benefits and in the work that is performed. She has three people (2 HR and 1 safety coordinator) who report to her. She has worked for the company for 4 years and has been in her current position for 1 year. She has never worked directly with the claimant during her employment.

Ms. Stuart testified that the procedure for handling work injuries is for the worker to report the injury to the supervisor. An accident report is filled out and HR is notified.[23] She testified that the claimant filled out an employee statement for a work-related injury on March 3, 2008 and treatment was provided.[24]

Ms. Stuart testified that claimant came to work on April 1, 2008 complaining of dizziness and was sent to the office then sent to the doctor. The doctor diagnosed claimant with bilateral hand and arm pain. He determined that claimant was in need of

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[20] *Id.* at 25-26.

[21] *Id.* at 15.

[22] *Id.* at 17.

[23] *Id.* at 10.

[24] *Id.* at 14.

physical therapy and light duty. Also according to the medical record, claimant also complained of tingling in her hands from her wrists after she starts working and pain from her elbows that shoots into her hands while working. Claimant's pain is better when she is not working.

Ms. Stuart testified that claimant's employee file includes an email indicating that claimant did not have a work-related injury and that she did not think that she was cut out for production work. Claimant was willing to self-terminate her employment if RSI agreed to call it a layoff and not fight her application for unemployment benefits. Claimant's employment ended April 1, 2008.

Claimant met with Dr. John McMaster[25] for an IME on April 28, 2010. In preparation for this evaluation, claimant's previous medical records were reviewed and her conditions that existed prior to her work accident were identified. Conditions that were treated after claimant was terminated were also identified.

Dr. McMaster described claimant as a pleasant, cheerful individual who seemed to be coping and dealing with mild cognitive impairments. Dr. McMaster felt that the claimant possessed average to just slightly less than average intelligence. But claimant understood his questions and had a "good fund" of knowledge given her educational experience.[26]

Dr. McMaster's evaluation focused on claimant's upper extremities and neck. He found that she had the grip strength of a female her age. His assessment is that in the course of claimant's employment she developed bilateral carpal tunnel syndrome, for which she had surgery in October 2008 and January 2009.

However, he could not find a causal relationship between claimant's occupational incident and the carpal tunnel syndrome diagnosis. He opined that the claimant did not suffer any injury of a permanent nature.[27] Dr. McMaster opined that at most claimant suffered from soft tissue complaints consistent with a strain, subjective in origin, that could not be verified as related to any specific injury, illness or condition. He found that claimant's carpal tunnel syndrome was temporarily worsened in the course of her employment with respondent, but not to the degree as to be permanently aggravated or caused by her work duties.[28]

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[25] In addition to his work for respondent, Dr. McMaster is the Medical Director for Occupational Health at Hawker Beechcraft. (McMaster Depo. at 39-40).

[26] *Id.* at 12.

[27] *Id.* at 14.

[28] *Id.* at 14-15.

Utilizing the 4th Edition of the AMA *Guides*, Dr. McMaster opined that the claimant had a 10 percent permanent partial impairment to each upper extremity for the carpal tunnel syndrome. He felt that claimant was in need of temporary work restrictions of no use of vibratory tools on a repetitive basis.[29]

Dr. McMaster opined that the claimant, in her current condition, could perform the job duties she did while working at Medicalodge. He felt that the claimant could work as a cashier, child care attendant, counter clerk, home attendant or an office cleaner.[30]

It is Dr. McMaster's impression that the February 12, 2008 incident at work was what initiated the occupational injury, illness, or condition that was subsequently identified and reported as carpal tunnel syndrome. And based on the history provided to him, he considered claimant's work activities to be the mechanism of injury. However, he does not believe that repetitious use of the upper extremities causes carpal tunnel syndrome.[31] When asked if repetitious use of one's upper extremities could permanently aggravate carpal tunnel syndrome, Dr. McMaster testified that yes, some can, but it depends on what repetitious use of the upper extremities activities are involved. Dr. McMaster opined that carpal tunnel syndrome is a disease process that is multi-factorial in origin and cannot be causally related to any one activity or event. And with certain qualifications, repetitious use of the upper extremities would be included in those factors.[32]

Dr. McMaster imposed restrictions on the claimant to avoid job tasks that require high repetitive functions involving the use of the wrists and hands with cycle times of less than 30 seconds or more than 50 percent of the cycle time. Claimant should avoid activities involving performing fundamentally the same activity and avoid high force jobs where the estimated average hand force requirements necessitate more than 40 kilograms of force on a repetitive basis. Assumption of awkward wrist positions with posturing involving more than 45 degrees of wrist flexion or extension should only be performed on a limited basis. Finally, claimant should avoid the use of vibrating powered hand tools absent dampening equipment, on more than a limited basis.

Dr. McMaster opined that most people who perform repetitive activities don't develop carpal tunnel syndrome. He noted that claimant's grip strength remained the same before employment with respondent, during employment with respondent and after

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[29] *Id.* at 16-17.

[30] *Id.* at 18-19.

[31] *Id.* at 37-38.

[32] *Id.* at 53.

surgery.[33] He also opined that he felt claimant was capable of employment in a nursing home as a certified nursing assistant. Dr. McMaster testified that as sad as it may be, he has seen others with less ability to function and communicate with people working in nursing homes. Therefore, claimant should have no problem doing so.[34]

Dr. McMaster was asked to answer a series of questions and the answers are as follows:

> 1. *Q. Specifically, what is your diagnosis of claimant's condition as it pertains to alleged work-related injuries?*
>
> A. Claimant experienced transient upper extremity and cervical soft tissue strain in the course of performing her occupational duties for respondent.
>
> 2. *Q. Do you believe* claimant's *current complaints are causally related to* claimant's *alleged accidental injury or are related to either another event or the natural aging process?*
>
> A. Claimant's occupational tasks and subsequent diagnosis can't be verified on a scientific or medical basis to be casually related to the occupational incident. The carpal tunnel syndrome in the claimant is a multifactoral disease process that is very common in the general population and can be exacerbated and aggravated by a number of common activities in daily living inside and outside of an occupational environment.
>
> 3. *Q. If the* claimant *had reached maximum medical improvement, what are your options regarding the claimant's functional impairment as expressed in a percentage form . . .?*
>
> A. Claimant has a 10% permanent partial impairment to each upper extremity (6% whole person impairment) (Combined for a 13% whole person impairment).
>
> 4. *Q. What permanent restrictions, if any, do you recommend . . .?*
>
> A. Claimant should avoid essential job tasks that require high repetitive functions involving the use of the wrists and hands as previously identified.
>
> 5. *Q. Do you believe claimant is permanently and totally disabled as a result of this work-related injury?*

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[33] *Id.* at 57-58.

[34] *Id.* at 60-62.

A. Claimant is not permanently and totally disabled and is capable of continuing to perform occupational tasks performed prior to the occupational incident.[35]

Claimant was referred by respondent to Dr. Michael Pronko, a board certified physician in psychiatry and neurology, for a psychiatric evaluation. Dr. Pronko testified that most of the time in workers compensation cases he is asked to evaluate the patient based on the physical nature of the injury with a psychiatric component.

As part of his evaluation, Dr. Pronko gave the claimant a questionnaire to fill out so that he could obtain some biographical information which, from a psychological standpoint, he could use, along with other standard tests, to gather information about claimant and her ability to function. He also reviewed medical records, depositions and other reports to aid in determining what happened and how the claimant is functioning.

Dr. Pronko testified the claimant declined to complete, and was excused from completing, the biographical data sheet because she has trouble writing and it required a lot of writing.

Dr. Pronko opined that the claimant came out with no peculiar profile because she answered the MMPI-2 test in a way that underscores her having brain damage. Of the 566 true/false questions, claimant answered 92 percent with false as the answer and 8 percent with true as the answer, which Dr. Pronko testified is not uncommon for someone with a degree of brain damage. He identified this as answering in a perseverative way, which means she repeats the same thing. These test results, coupled with his interview of the claimant, confirmed her brain damage.[36]

Claimant was cooperative during her evaluation. She reported that she was able to engage in activities of daily living despite complaining of numbness in her hands.

Dr. Pronko didn't feel that the claimant's employment with respondent had anything to do with the after effects of claimant's 2005 motor vehicle accident. Dr. Pronko testified that the claimant reported to him that she had trouble with her hands while working for respondent (Prestige), but had surgery and was feeling much better.[37]

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[35] *Id.*, Ex. 2 at 12-13 (McMaster's Apr. 28, 2010 IME Report).

[36] *Id.* at 10.

[37] *Id.* at 13-14.

Dr. Pronko opined that from reviewing claimant's medical records and the testing that he performed, he believes claimant is capable of working.[38] He opined that the claimant would need supervision and would not be able to work independently.

> Q. . . .do you feel that she would benefit from the supervision because of her cognitive impairment?
>
> A. Yes, because of the cognitive impairment. I don't think that the carpal tunnel is going to be that difficult for her. I think as a CNA she could be assigned to make a bed, give somebody a bed bath with someone coming in and checking from time to time. I think she could operate independently in that way.[39]

Dr. Pronko reviewed the task list of Steve Benjamin as part of his process of determining claimant's ability to work, and opined that the claimant could be successful with supervised work but not successful in work that was self-directed. This would limit the types of jobs available to the claimant in the open labor market.

In short, Dr Pronko feels that the claimant needs to perform work under supervision and that doesn't require repetitious use of her upper extremities. He also stated that the claimant shouldn't work in a factory.[40] Supervision is not absolutely required for the claimant, but is something that would be helpful.

Travis McBride, Administrator at Medicalodge in Columbus, Kansas, has worked for Medicalodge for 12 years. He vaguely recalls claimant during the time she worked for New Horizons and Medicalodge North.

Mr. McBride testified that background check are done on everyone who is a potential hire. They are subject to a health screening and personal interview and if they pass are put through training and orientation.[41] If a potential employee had problems with some of the testing given for the job they are hired on a 90 day probationary period and if they are not able to pass the testing during that time they are terminated. If they pass they are considered a permanent employee.

Mr. McBride noted that the claimant has been a long-time employee of Medicalodge since the 90's. He testified that there was nothing in claimant's personnel record that suggested that she was unable to do her work at Medicalodges due to cognitive reasons.

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[38] *Id.* at 16-18.

[39] *Id.* at 19.

[40] *Id.* at 57.

[41] McBride Depo. at 6-7.

Claimant was even recommended for a raise by her supervisor Sharon Brazeal in 2006.[42] Mr. McBride testified that he vaguely remembers the claimant and has no opinion regarding her ability to work since her injury at Prestige Cabinets. He has not had any contact with the claimant since she left Medicalodges employment.

The reason claimant stopped working for Medicalodge was because the work was too much for her after her vehicle accident. Mr. McBride didn't know if the work was physically or mentally too much for the claimant after the accident. But her employment had to be terminated because she was not able to perform her work duties per Medicalodge's policy and standards.

Claimant was evaluated at her attorney's request by vocational specialist Karen Terrill on September 16, 2009. Ms. Terrill determined that claimant, with an IQ of 78 and few if any transferable skills, is realistically unemployable and is permanently and totally disabled.

Claimant was evaluated at respondent's request by vocational specialist Steve Benjamin on December 21, 2009. Mr. Benjamin found claimant capable of performing job tasks of a cashier, child care attendant, counter clerk, home attendant and office cleaner.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[43]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[44]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[45]

Claimant suffered personal injury by accident while working for respondent in a hand intensive labor job. The accidents, a series, resulted in bilateral carpal tunnel syndrome

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[42] *Id.* at 13-14.

[43] K.S.A. 44-501 and K.S.A. 44-508(g).

[44] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[45] K.S.A. 44-501(a).

which was treated surgically. As the result of these injuries, claimant was no longer able to perform her duties for respondent.

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.

The Kansas Supreme Court, in Casco,[46] held that compensation for scheduled injuries are the general rule and non-scheduled injuries are the exception. K.S.A. 44-510c(a)(2) established a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.[47]

Here, claimant suffered bilateral injuries to her upper extremities. The record conflicts regarding whether claimant can perform work in the open labor market, or whether her ability to obtain a job has been totally compromised as the result of her injuries. Respondent argues that claimant's labor market options were severely limited by the automobile accident in 2005, which resulted in serious head injuries and a resulting limited mental capacity. While this is true, respondent took claimant as they found her. This claimant was limited significantly when she came to them. But, she was physically and mentally able to perform jobs in the open labor market and in particular with respondent, until she developed the bilateral hand injuries while working for respondent. The vocational experts, Mr. Benjamin and Ms. Terrill disagree as to claimant's ability to obtain a job.

The ALJ expressed concern regarding Dr. Pronko's testimony that claimant would require supervision in any of the jobs identified by Mr. Benjamin. However, the Board does not read Dr. Pronko's testimony so rigidly. While Dr. Pronko stated that claimant needed supervision, he did not seem to require that someone be standing at claimant's shoulder the entire time. However, even with Dr. Pronko's and Mr. Benjamin's opinions, this claimant's job potential is seriously questioned. With the prior head injury and her limited mental capacity, claimant's job prospects were limited. Coupled with the bilateral hand injuries, her job prospects are dismal. The Board finds the opinion of Dr. Prostic more persuasive than that of Dr. McMaster regarding claimant's physical limitations. The Board finds the opinion of Ms. Terrill more persuasive than Mr. Benjamin. The Board also finds the opinion of Dr. Pro that claimant is permanently and totally disabled from substantial

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[46] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh. denied (May 8, 2007).

[47] *Id.*, Syl. ¶ 7,8.

employment persuasive. Finally, the Board agrees with the ALJ that respondent has failed to rebut the presumption of permanent total disability under K.S.A. 44-510c(a)(2). The finding by the ALJ that claimant is permanently and totally disabled is affirmed.

Respondent argued to the Board that in order for a claimant to qualify for permanent total disability, K.S.A. 44-510c requires that the claimant suffer either a total loss of the extremity or an amputation of the extremity. Simple bilateral injuries to the extremities is not sufficient, according to respondent, for the presumption to come into play. However, the Kansas Supreme Court, in Casco, was asked to consider if a claimant was permanently and totally disabled while only suffering a loss of function to both arms. The Court determined that a claimant with a less than 100 percent loss of each upper extremity can qualify as permanently and totally disabled under K.S.A. 44-510c. Total loss of the extremities or an amputation of the extremities is not required in order to bring the statutory presumption into play.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 1, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge